Supreme Court, U. S.
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In the Supreme Court Of the United States

DECEMBER, 1975

No. 75-931

BROOKSHIRE BROTHERS, INC., ET AL
Petitioners

vs.

VIRDIE SMITH, ET AL
Respondents

PETITION FOR WRIT OF CERIORARI TO THE SUPREME COURT OF THE UNITED STATES

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No.

BROOKSHIRE BROTHERS, INC., ET AL
Petitioners

vs.

VIRDIE SMITH, ET AL
Respondents

PETITION FOR WRIT OF CERIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, 5th Circuit, affirming, by split decision, the judgment of the Trial Court, the United States District Court for the Eastern District of Texas.

CITATIONS TO OPINIONS BELOW

The judgment of the Trial Court, the United States District Court for the Eastern District of Texas, Beaumont Division, was entered in favor of respondents and against petitioners, such judgment having been

signed by the Trial Judge May 17, 1974. A copy of such judgment is printed in Appendix A hereto. The opinion of the United States Court of Appeals, 5th Circuit, is printed in Appendix B hereto and the order overruling petitioners' motion for rehearing is printed in Appendix C.

JURISDICTION

The judgment of the District Court was signed and entered May 17, 1975. Thereafter, an appeal having been taken to the United States Court of Appeals, 5th Circuit, and its judgment, by a split decision, was rendered September 15, 1975. Petitioners' motion for rehearing was denied by order of the Court October 20, 1975, with Judge Gee dissenting.

HOW FEDERAL QUESTIONS PRESENTED

The underlying question involved in this petition concerns the issue of what is "state action" as contemplated by the *Civil Rights Act, 42 U.S.C.A., Section 1983.*

QUESTIONS PRESENTED

POINT ONE

The Honorable Circuit of Appeals erred, itn its majority opinion, in holding that there was evidence to support the Trial Court's judgment that defendants were acting under color of state law in violation of *Title 42, Section 1983, U.S.C.A.,* at the time of the occurrences made the basis of this suit.

POINT TWO

The Honorable Circuit Court of Appeals erred in holding that there was evidence to support the Trial Court's finding that "the arrests by the Police Department of the City of Lufkin were made without the filing of a valid complaint and without any investigation, **all of which was pursuant to said preconceived plan"** (emphasis added) because there is no evidence of any plan between the defendants and the Lufkin Police Department as to how and in what manner the Lufkin Police Department would handle suspects in the custody of the Police Department.

POINT THREE

The Honorable Court of Appeals erred in holding that petitioners could be civilly liable for wrongful acts which may have been committed by the Lufkin Police Department because there is no evidence that the petitioners designed, participated in or in any manner compelled the manner in which the Lufkin Police Department would handle suspects.

STATUTE INVOLVED

The statute involved in this litigation is *Title 42, Section 1983, U.S.C.A.,* which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to

the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.'

STATEMENT

This action arises from the apprehension of respondents, Virdie Smith and Donnie McClure while in a grocery store operated by petitioner Brookshire Brothers, Inc., on September 13, 1971. Respondents were together and while in petitioner's store took into their possession several items while shopping. The evidence is undisputed that Mrs. Smith selected and paid for her grocery items (Tr. 12). A dispute exists as to whether Mrs. McClure passed the check-out point without disclosing the items in her possession or was ever given an opportunity to pay for them. Nevertheless, at some point in time after Mrs. Smith had cleared the check-out stand, the two respondents were asked to come to the rear of the store where they were interviewed by petitioners Glenn Nevill and Kenneth Sandel, employees of Brookshire Brothers, Inc.

Prior to the apprehension of respondents, Nevill's attention was drawn to the two ladies because of their suspicious actions (Tr. 115, 116). The respondents were located at that time in the candy aisle (Tr. 116). Upon becoming suspicious he located himself upstairs in the store where he was able to look through a hole onto the store floor and observe the respondents (Tr. 122).

He observed Mrs. McClure to pick up a jar of cold cream, walk around into the candy aisle where Mrs. Smith was located, with Mrs. Smith watching at the end of the aisle (Tr. 127). At this particular time Mrs. McClure had a sack of oranges and the jar of cold cream. He saw Mrs. McClure put the cold cream inside the top of her purse (Tr. 129).

The petitioner, Kenneth Sandel, assistant manager and the person in charge of the store at the time of the occurrence, also had his suspicions aroused by the actions of the respondents and went immediately to the lookout portion in the back of the store (Tr. 151). When he arrived, Mr. Nevill was not there but arrived shortly thereafter (Tr. 151). This petitioner observed Mrs. McClure to attempt to put the sack of oranges in her purse when Randy Boyd, an off-duty employee, came by the end of the counter and she was observed to abandon the idea of putting the oranges into the bag (Tr. 152). After that incident, the petitioner Nevill arrived at the observation position and petitioner Sandel saw Mrs. McClure pick up the cold cream and with Mrs. Smith facing her put the cold cream into her purse (Tr. 153). Immediately thereafter, the two respondents came out of the aisle and headed for the check stand (Tr. 154). Mr. Sandel and Mr. Nevill immediately left the observation platform and headed for the front of the store (Tr. 154). Randy Boyd, an off-duty employee who happened to be in the store, testified that as he was walking through the store he heard some talking, turned and looked and saw one lady putting something in her purse, which looked like oranges

(Tr. 185). Upon noticing this, he also went to the back room and observed that Mr. Sandel was up on the observation position, and he took no further action (Tr. 185). Petitioner Nevill also observed Mrs. McClure to put the cold cream in her purse while in the candy aisle (Tr. 127).

After Mr. Nevill and Mr. Sandel went to the front of the store, Mr. Nevill positioned himself at the check-out counter for the purpose of determing whether Mrs. McClure would pay for the cold cream (Tr. 136). Mr. Nevill testified that after both ladies had passed through the check-out stand, he asked them to go to the back of the store and they went voluntarily (Tr. 138). When they were in the back of the store, a dispute arises as to whether the cold cream was inside the purse or in a side pocket (Tr. 139, 140). After the conservation, the police were called and arrived at the scene, took the two respondents into custody and they were filed on at the City Hall in the City of Lufkin. From these occurrences, respondents filed suit in the United States District for the Eastern District of Texas, Beaumont Division, seeking damages against petitioners under several theories of law, including claimed violation of their civil rights protected under *42 U.S.C.A., Section 1983.* The critical finding of fact by the Trial Court is as follows (Tr. 107):

> "Kenneth Sandel and Wayne Rumsey devised a plan whereby suspected shoplifters would be confined in the store while the Police Department of the City of Lufkin was called by telephone to come and arrest the suspected shoplifters and take them to police headquarters for booking and fingerprinting. The arrests by the Police Department of the City of Lufkin were made without the filing of a valid complaint and without any investigation, all of which was pursuant to said preconceived plan."

The United States Court of Appeals held that there was evidence to support such finding and affirmed the judgment of the Trial Court, with Justice Gee dissenting. Petitioners' motion for rehearing was likewise overruled by a two-to-one majority.

ARGUMENT

In order for respondents to recover under *Section 1983,* they must establish both deprivation of a right secured by the Federal Constitution or laws and action by petitioners under color of state law. *Adickes v. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1958, 26 L.Ed.2d 142 (1970). All parties to this suit are private citizens. Petitioners contend that any actions on their part in connection with this suit were private in nature and motivated solely for the protection of goods owned by petitioner or under their protective custody. No evidence exists in the record of this cause that petitioners ever claimed that they were operating under any authority of state law.

In determining what is "state action" it is well that we examine the definition of such term as has been used repeatedly by the Supreme Court. This definition seems to be well established as follows:

> "For action to be taken under color of state law requires misuse of power, possessed by virtue of state law and made possible only because the wrong-doer is clothed with the authority of state law..." *United States v. Classic,* 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L. Ed, 1368 (1941); *McCord Monroe v. Pape,* 365 U.S. 167, 184, 81 S.Ct. 473, 5 L. Ed.2d 492 (1961); *Weyandt v. Masons Stores, Inc.,* 279 F. Supp. 283 (1968.

At this juncture, the question is asked what "misuse of power, possessed by virtue of state law and made possible **only** because the wrong-doer is clothed with the authority of state law" is shown by the evidence to have existed in this case?

The critical fact finding before the Court is that "the arrests by the Police Department of the City of Lufkin were made without the filing of a valid complaint and without any investigation." These facts are acts that were committed by the Lufkin Police Department as actually stated in the finding. The next critical portion of the finding is "all of which was pursuant to said preconceived plan." This record is wholly void of any preconceived plan whereby the Lufkin Police Department would arrest suspects without a valid complaint and without any investigation. There is no evidence that the petitioners influenced the Police Department as to how and in what manner they could make arrests and the procedures to be followed thereafter. The majority opinion of the Court of Appeals cites some bits and pieces of testimony that it claimed to support such finding of fact. As stated in the dissenting opinion by

Justice Gee, such quoted evidence

> "reveal with eloquence the want of proof of such a thing. The first two establish that there was indeed a 'plan.' The plan was, as I have noted above, that when a merchant caught a shoplifter (or thought he had), he would call the police to come out rather than take him down to the station himself. The third and last passage is merely Sandel's explanation of why he filed a complaint against both women rather than Mrs. McClure alone."

In *Weyandt v. Masons Stores, Inc.,* supra, plaintiff claimed a violation of *Section 1983* in that she was apprehended as a shoplifter 500 feet outside a store, was filed on, and placed in jail. She sued the store, its manager, the detective agency employed by the store, the detective, a police officer and a deputy constable as well as the Justice of the Peace. In attempting to show "state action" she sought support from Purdons Pa. Stat. Ann., Sec. 4816.1(b), which provided that persons concealing unpurchased goods may be detained, in a reasonable manner and for a reasonable length of time, by a peace officer or a merchant or a merchant's employee in order that recovery of such goods may be effected. In holding that *Section 1983* had no application to these facts, the Court stated:

> "The fallacy of plaintiff's argument appears to be an equating acting under license of state law with acting under authority of state law. The same may be said of the contention, advanced at

oral argument, that defendants Ellis and Matlack were acting under authority of state law if they were licensed under the Pennsylvania Private Detectives Act."

The same holding under *Section 1983* was had in *Warren v. Cummings,* 303 F. Supp. 803 (1969), another shoplifting case, when the plaintiff had bought a soft drink, consumed it and was apprehended after leaving the store by the owner, his agent and a person named Robertson who identified himself to the plaintiff as either a detective or a probation officer, when in fact he was neither. Plaintiff contended state action as against Robertson because of his false identification of himself as a police officer. Dismissing the case, the Court stated:

"The wrong-doer must actually represent the state whereby his act is the act of the state, or there is no action under color of state law. Screws v. U.S., 325 U.S. 91, 65 S.Ct. 1031, 89 L. Ed. 1495 (1945)."

It is pointed out that *Weyandt* and *Warren,* supra, though trial court opinions, are the only shoplifter cases found by petitioner and this suit is a case of first impression in the circuit courts or before the Supreme Court.

The majority opinion recognizes that there would be no violation under *1983* if the store-minders were guilty of nothing but false imprisonment. It should also follow that if the police had properly investigated the offense when they were called, and not taken custody

of respondents, no "state action" would have been involved. It follows then, without question, under the majority opinion, that state action exists in this cause solely because of some impropriety on the part of the Police Department. There is no evidence that petitioners in any manner influenced or dictated the type of investigation the police officers should make. Likewise, there is no evidence that petitioners had any control of, or influenced, the police in the manner of how a written complaint is made. There is no evidence that any so-called plan contemplated anything more than the police answering a call for help from petitioners. In essence, it has now been held that a responsible citizen, who seeks the assistance of the police, rather than taking the law into his own hands, and the police fail to perform their functions, can subject such citizen to civil liability under Section *1983*. We do not believe that Congress would ever pass a law which would encourage self-help when the proper and expeditious manner of handling the situation would be to call the police. The holding of the Court of Appeals places a merchant or private citizen in an intolerable situation when a suspected crime has been, or is being committed. Such citizen can do nothing and lose his property. He can resort solely to self-help and suffer the consequences of possible suits for false imprisonment or other civil actions arising therefrom. The other alternative is to solicit the support and assistance of the police department, whose proper function is the investigation and apprehension of suspected criminals.

It has previously been held that one who initiates prosecution does not expose himself to liability under the Civil Rights Statutes. *Cuiksa v. City of Mansfield,* 250 F. 2d 700, 704 (6th Cir. 1957). In *Joyce v. Ferrazzi,* 323 F. 2d 931 (1st Cir. 1963), the plaintiff sued a doctor in private practice, various police officers and the superintendent of a mental institution for falsely arresting the plaintiff, without warrant, and committing him to the mental institution for ten days. In denying recovery under *Section 1983* the Court held:

> "Since it indisputably appears from the record that the defendent doctor acted as a private practioner in committing the plaintiff to the mental institution under the Massachusetts Statute, the constitutional validity of which is not challenged, it follows that this action was that of a private citizen."

In this case, the doctor had authority under a Massachusetts Statute to do what he actually did. At the time of the occurrence in question, there was a Texas Statute, now repealed, which authorized a merchant to detain suspected shoplifters, *Article 1436e, Texas Penal Code.* A similar statute was made the basis of the Court's holding in *Warren v. Cummings,* supra, and *Weyandt v. Masons Stores, Inc.* In *Warren v. Cummings,* supra, it was stated:

> "It follows, of course, that where individuals act in the ambit of their personal pursuits they do not act under color of state law."

Respondents rely on *Hall v. Garson,* 430 F.2d, 430, 439

(5th Cir. 1970). As pointed out by Justice Gee, *James v. Pinnix,* 495 F.2d 206 (5th Cir. 1974); *Brantley v. Union Bank & Trust Co.,* 498 F.2d 365 (5th Cir.), cert. denied, 419 U.S. 1034, 95 S.Ct. 517, 42 L. Ed.2d 309 (1974); *Calderon v. United Furniture Co.,* 505 F.2d 950 (5th Cir. 1974); are more recent decisions rejecting application of *Hall* in cases relating to self-help repossession statutes. *Article 1436e* of the *Texas Penal Code,* now repealed, allowed repossession only of the items taken or suspected to be taken from the shopkeeper. In *Hall,* supra, the landlord was allowed to repossess any type of property to secure the debt and this was found to be more in the analogy of the action of a sheriff to satisfy a judgment.

Like defendants in *James, Brantley and Calderon,* petitioners acted in this case to recover property they believed to belong to Brookshire Brothers. They were under no statutory duty to take any action. They were not protecting the public interest but protecting the property interest of their employer.

Respondents were strangers to petitioners. Because of previous shoplifting experiences, petitioners had done nothing more than discuss their problem with the Police Department. The evidence is wholly void of any plan other than petitioners would call the police when a suspected shoplifter had been apprehended. How the police handled the situation at that point, the evidence is wholly void of any plan, scheme or design.

If the opinion of the Court of Appeals is allowed to

stand, every person who has had a conversation with a police official as to how to handle suspected law violators will be subject to suit under *Article 1983.* Crowd control at sporting events, public schools, political gatherings and other such functions would necessarily call for some prior communication between the civilian authorities and the local police authorities. Surely, it was not the Congressional intent to make a responsible citizen a "wrongdoer" by simply arranging for the police to come when they are needed.

Petitioners submit that under the undisputed evidence in this case as analyzed by the dissenting opinion in the Court of Appeals, and the authorities cited therein, it is established as a matter of law that no state action exists in this cause. Such undisputed evidence established that the petitioners were acting solely in self interest, not broad public interest, in any and all of their actions involved in this suit. The petitioners viewed the respondents as "supposed offenders." The petitioners delived the respondents into the custody of the police officer. After that point, petitioners had no authority and exercised no authority or influence in the manner or procedures that the police officers performed their duties. There is simply no evidence that the petitioners had any preconceived plan with the Police Department as to how the Police Department should perform its functions.

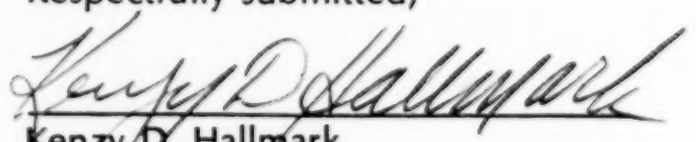
No duty was imposed on petitioners by law to take any action. Petitioners could simply haved ignored the

occurence involved int this suit had they so desired. Therefore, the undisputed evidence wholly fails to show that the petitioners acted under "color of state law" as defined in *United States v. Classic,* supra. There is simply no evidence of "misuse of power" of petitioners possessed by virtue of state law. The acts and conduct of petitioners were not made possible "only" because they were clothed with authority of the state, but were taken solely for the protection of their personal interests.

PRAYER

WHEREFORE, premises considered, petitioners pray that this writ of certiorari be granted and that upon hearing hereof the judgment of the Court of Appeals, 5th Circuit, and the judgment of the Trial Court be reversed and judgment rendered that respondents have and recover nothing by reason of this suit and that petitioners recover their costs.

Respectfully submitted,



Kenzy D. Hallmark
P.O. Drawer 1728
Lufkin, Texas 75901

CERTIFICATE OF SERVICE

This is to certify that two true copies of the foregoing Petition for Writ of Certiorari have been mailed by United States Mail to Mr. Jerry L. Hatton, attorney at law, 906 Goodhue Building, Beaumont, Texas, attorney for respondents, on the 30 day of December, 1975.

Kenzy D. Hallmark

Kenzy D. Hallmark

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

VIRDIE SMITH, ET AL
Plaintiffs

vs.

BROOKSHIRE BROTHERS, INC.,
ET AL
Defendants

NO. B-73-CA-78

JUDGMENT

This cause having come on for trial on the 27th day of March, 1974, with the Court sitting without a jury, the same first having been duly and regularly set for trial, the Plaintiffs appeared in person and with their attorneys, and the Defendants appeared by their counsel and also in person, and the Court proceeded to hear evidence and to consider the pleadings.

Upon both parties having concluded their evidence, the Court took the case under advisement and now, after having duly considered all arguments presented, and after having made conclusions of law and findings of fact, the Court now enters judgment as follows:

The Court finds that it has jurisdiction of this case as to both Plaintiffs, and as to all causes of action asserted herein, and the Defendant's Motion to Dismiss filed by Brookshire Brothers, Inc., is hereby overruled.

The Court further finds that the Plaintiff, Donnie McClure, is entitled to have and recover of and from the Defendant, Brookshire Brothers, Inc., and its assistant store manager, Kenneth Sandel and his assistant, Glenn Nevill for damages in the sum of Six Thousand and No/100 ($6,000.00) Dollars.

The Court further finds that the Plaintiff, Virdie Smith, is entitled to recover her damages of and from the Defendant, Brookshire Brothers, Inc., and its assistant store manager, Kenneth Sandel and his assistant, Glenn Nevill, for damages in the sum of Six Thousand and No/100 ($6,000.00) Dollars.

It is, therefore, ORDERED ADJUDGED and DECREED by the Court that the Plaintiff, Donnie McClure, have and recover her judgment of and from the Defendants, Brookshire Brothers, Inc., Kenneth Sandel and Glenn Nevill, in the sum of Six Thousand and No/100 ($6,-000.00) Dollars.

It is further ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff, Virdie Smith, have and

recover her judgment of and from the Defendants, Brookshire Brothers, Inc., Kenneth Sandel and Glenn Nevill, in the sum of Six Thousand and No/100 ($6,-000.00) Dollars.

All costs of court are taxed against the Defendants.

ENTERED this 17th day of May, 1974.

JOE E. FISHER
United States District Judge

APPENDIX B

VIRDIE L. SMITH, ET AL
Plaintiffs-Appellees

v.

BROOKSHIRE BROTHERS, INC., ET AL
Defendants-Appellants

No. 74-2606

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
September 15, 1975

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges.

PER CURIAM:

Virdie L. Smith and Donnie McClure brought an action for damages against Kenneth Sandel, Glenn Nevill and Brookshire Brothers, Inc., alleging false imprisonment, malicious prosecution and violation of civil rights protected under 42 U.S.C. ‡ 1983. The suit was prompted by actions taken by employees of Brookshire Brothers to foil those they suspected of being shoplifters. The trial court believed that the plaintiffs had proven their claim and awarded damages. Defendants appeal.

On September 13, 1971, Virdie Smith and Donnie McClure entered Brookshire Brothers of Lufkin, Texas, to purchase groceries. Virdie Smith chose a few items. Donnie McClure chose a jar of cold cream and put it in the outside pocket of her purse. Virdie Smith paid for her groceries on the way out of the store. But "although Donnie McClure was in the vicinity of the checkout counter, she had not passed through the counter and was not in the process of leaving the store when detained by the defendants Sandel and Nevill." (Finding of Fact 7.) Sandel and Nevill took both women to the rear of the store and called the police. Policeman Tooley arrived on the scene. The policeman testified that he was not told the manner in which the plaintiffs were apprehended nor does the evidence show him to have known the circumstances which led to the apprehension. He was simply told that they had taken a jar of cold cream. On this basis he took them down to the police station where they were fingerprinted and booked. No written complaint was made out at the time the police took McClure and Smith into custody. Rather a store officer went down to the police station some minutes later. At that time he "signed the blank paper that the officer asked me to sign." The charges were ultimately dismissed. The district court found that while McClure's deposit of the jar in her bag during shopping created some cause for suspicion, that fact did not create reasonable grounds to detain the woman as a shoplifter before she had been given

an opportunity to pay for the item. The court also found that the appellants had acted under color of state law in bringing about the detention of appellees and had thus violated their civil rights within the purview of ‡ 1983. He awarded each $6,000.00.

In sum, the police had detained the appellees without independently establishing that there was probable cause to do so—they took the appelles into custody without a valid complaint having been filed and without knowing the facts to believe that a crime had been committeed. See *United States v. Salvo,* 5 Cir. 1971, 447 F.2d 474; *United States v. Lipscomb,* 5 Cir. 1970, 435 F.2nd 795. Instead, they depended on the conclusory assessment of the store officers. These store managers, in turn, did not have probable cause for believing that McClure was a shoplifter and that Smith was an accomplice.

But in order for the defendant-appellant Brookshire to be liable under ‡ 1983 for fostering a detention without probable cause, the plaintiffs must show that Brookshire was acting under color of law. The police may have made a mistake but they are not defendants here. The store managers may have made a mistake in detaining appellees but that alone would not make them liable under ‡ 1983; it would only create a state tort action, depending on the state's false imprisonment standard. The plaintiffs had to show that the police and the store managers were acting in concert; that Brookshire and the police had a customary plan whose result was the detention in the present case.

Adickes v. Kress & Co., 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

The district court decided that such a plan had been evidenced: "The arrests by the Police Department of the City of Lufkin were made without the filing of a valid complaint and without any investigation, *all of which was pursuant to said preconceived plan.*" (Finding of Fact 4; emphasis added.) We do not believe that such a finding is clearly erroneous. Many colloquies at trial gave testimony to the proposition that Brookshire officials knew that they could have people detained merely by calling the police and designating the detainee. Illustrative of the evidence are the following exchanges:

1.

Q: Does Brookshire, to your knowledge, have any type of pre-arranged plan with the Lufkin Police Department to come and assist them when they need help, particularly in the area of shoplifting?

A. (Officer Tooley): Yes, sir, at that time they did.

2.

Q. And shoplifting was part of your job when merchants would call in that they had caught somebody, they would call the police department and you would go out and pick them up?

A: (Officer Tooley): Yes, sir.

Q: Is this a pre-arranged plan you are talking about, they didn't bring them in theirselves, they would call you and you would come get them?

A: Yes, sir.

3.
Q: What led you to file a complaint on Mrs. Smith?

A: (Mr. Sandell): Well, there had been previous cases that I asked the officer about that was similar to this here when maybe one assisted in helping another one or watched for them and so forth, and the officer always said to file on both of them if they were helping like this, and after talking with her also.

We believe that the district court was not clearly erroneous in his finding from such evidence that a plan existed which made the defendant-appellant an actor under color of law and thus liable for damages under 42 U.S.C. ‡ 1983.

Affirmed.

GEE, Circuit Judge (dissenting):

Affirming, the majority properly finds it unnecessary to discuss one of appellants' major contentions or to detail the facts at much length. Dissenting, I cannot avoid doing both.

On September 13, 1971, after two earlier shopping stops, Virdie Smith and Donnie McClure entered Brookshire Brothers of Lufkin, Texas, to purchase groceries. Virdie Smith chose a few items, put them in her shopping cart, and, she said, began to search for the large-size Milky Ways. Donnie McClure had accompanied her sister into the store. Sandel and Nevill, both employees of Brookshire Brothers, believed the women were acting strangely and decided to go to the observation post at the back of the store where they could watch all the aisles without being seen. There is no question that Virdie Smith had paid for her groceries on her way out of the store. The court found that she had done nothing more "suspicous" while in the store than glance around. Donnie McClure's actions, however, were in dispute. Appellants claimed that McClure had gone through the checkout line without paying for a jar of Pond's cold cream. The court agreed that there was some cause for suspicion due to the fact that she had placed the jar of cold cream in the outside pocket[1] of her purse while passing through the aisles of Brookshire Brothers; however, he also found that she had not been given an opportunity to pay, so there were no reasonable grounds to believe that she was a shoplifter. Reasonable grounds or no, Sandel and Nevill, evidently convinced that they were about to successfully disrupt a plot between shoplifter and accomplice to filch a jar of cold cream, stopped the women before they left the store and took them to the rear of the store. McClure produced the cold

[1] Appellants claim inside.

cream, but both women disclaimed intent to deprive the store of any goods without paying for them. Nevertheless, the police were called. Policeman Tooley arrived on the scene; Nevill and Sandel pointed out the alleged wrongdoers; and Tooley took them to police headquarters where they were fingerprinted and booked. The court found that Tooley had made no independent investigation of the facts before taking the women in. No complaint had been filed when the women were removed from Brookshire's; Sandel later came to the station and signed a complaint form. The charges were ultimately dismissed. The court below found the appellants had acted under color of state law in violating the women's civil rights and awarded each $6,000.

Appellants' first attack is on the threshold requirement of the suit. In order to recover under ‡ 1983, the plaintiff must establish both deprivation of a right secured by the federal Constitution or laws and action by defendant under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Appellants here are private citizens, and they contend that their actions are private as well. If so, then Smith and McClure fail on both essentials of their suit: no action under color of law and no right protected by the Fourteenth Amendment since that amendment protects against state action only. *Hall v. Garson,* 430 F.2d 430, 439 (5th Cir. 1970). However, in some circumstances private citizens can be found liable under ‡ 1983. The court below did not designate specifically the reasons for finding that defendants had acted under

color of state law, but appellees suggest two possibilities: delegation of state functions and joint activity with state officials.

Here Sandel and Nevill were acting pursuant to now-repealed Article 1436e of the Texas Penal Code. That section provides that a merchant with reasonable grounds to believe a person has taken his goods wrongfully may, if done in a reasonable manner, detain the person to investigate ownership of the goods. Any person can seize goods to prevent shoplifting and bring the goods and, if possible, the offender before a magistrate, or deliver same to a peace officer for that purpose. Again, reasonable grounds are required.[2] *Hall v. Garson, supra,* appears on its surface to compel the conclusion that this statutory authorization is sufficient

[2] Prevention of consequences of shoplifting.

Sec. 2 All persons have a right to prevent the consequences of shoplifting by seizing any goods, edible meat or other corporeal property which has been so taken, and bringing it, with the supposed offender, if he can be so taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such a seizure, there must, however, be reasonable ground to suppose the crime of shoplifting to have been committed and the property so taken, and the seizure must be openly made and the proceeding had without delay.

Detention of persons

Sec. 3. Any merchant, his agent or employee, who has reasonable ground to believe that a person has wrongfully taken or has wrongful possession of merchandise, may detain such person in a reasonable manner and for a for a reasonable length of time for the purpose of investigating the ownership of such merchandise. Such reasonable detention shall not constitute an arrest nor shall it render the merchant, his agent or employee, liable to the person detained.

indication of state action. In *Hall,* we found state action when a landlord acted pursuant to state statute granting him a lien on personal property in a tenant's apartment to the extent of past-due unpaid rent and authorizing his peremptory seizure of that personal property without notice or prior resort to judicial proceedings. Entry into another's home and seizure of personal property possessed "many, if not all, of the characteristics of an act of the State." Execution of a lien was historically a state function, performed by the sheriff. By allowing the landlord to perform the function, the state had clothed him with such authority that his actions became state action. Appelles seek to coem with the *Hall* rationale by pointing to the detention aspects of the statute and analogizing them to arrest, a function performed by state peace officers. The argument is not without appeal but ignores more recent decisions of this circuit rejecting application of *Hall* in cases involving state self-help repossession statutes. *James v. Pinnix,* 495 F.2d 206 (5th Cir. 1974); *Brantley v. Union Bank & Trust Co.,* 498 F.2d 365 (5th Cir.), *cert. denied,* 419 U.S. 1034, 95 S.Ct. 517, 42 L.Ed.2d 309 (1974); *Calderon v. United Furniture Co.,* 505 F.2d 950 (5th Cir. 1974). Contrary to the roving authorization to take property unrelated to debt in *Hall,* the statutes in issue allowed repossession *only* of the item in which the creditor had a purchase moeny security interest. This rendered analogy to a sheriff's seizing property to satisfy a judgment more remote. Also, the action was of the sort long taken by private citizens. And in *Calderon,* the court refused to deviate from precedent

even though there had been an entry onto private property, absence of which the court thought significant in *James.* These cases, buttressed by the analysis used in a recent Supreme Court decision, *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), in which the Supreme Court failed to find state action in state regulation of a private utility company, lead me to conclude the action here was private.

Like defendants in *James, Brantley* and *Calderon,* Sandel and Nevill acted to recover only the particular property they believed still belonged to Brookshire Brothers, property in which the store had a well-defined personal interest. Unlike state police officers who have a continuing duty to arrest lawbreakers of all kinds, merchants are burdened with no duty under Article 1436e. Self interest, not broad public interest, is their guide to action. *Warren v. Cummings,* 303 F.Supp. 803 (D.Colo.1969) (shoplifting statute); *Weyandt v. Mason's Stores, Inc.,* 279 F. Supp. 283, 286-87 (W.D.Pa.1968) (shoplifting statute). The Texas statute merely codifies that limited self-help privilege in an owner to protect his property which has been recognized as a defense in tort suits. Prosser, Law of Torts ‡ 22 (3d ed. 1964) [citing *Burnaman v. J.C. Penney Co.,* 181 F.Supp. 633 (S.D.Tex. 1960), a case dealing with a similar Texas statute].

Whatever approach we might take were this a case involving racial discrimination, our task here, as noted in other state-action cases untouched by racial overtones, is to weigh carefully all factors and apply as

precisely as we are able the state-action doctrine. *See Greco v. Orange Memorial Hospital Corp.* 513 F.2d 873 (5th Cir. 1975); *James v. Pinnix, supra,* at 209. Having done so, I would conclude that the statute does not clothe the merchant with sufficient indicia of state function to make his action state action.

Alternatively, the appellees point to the concerted actions of private individuals and public officials which can in some circumstances constitute state action. *See United States v. Price,* 383 U.S. 787, 794, 186 S.Ct. 1152, 16 L.Ed.2d 267 (1966); *Adickes v. Kress & Co., supra.* Pertinent to this issue, the trial court found that company officials had devised a plan to confine shoplifters in the store while police were called to make the arrest. Further, the police then arrested those held without prior filing of a complaint or investigation "all of which was pursuant to said preconceived plan." More than 300 persons were apprehended over a period of several months.

I think the trial court's finding, affirmed by the majority, was clearly erroneous. The testimony does show that Brookshire Brothers had devised a plan to catch shoplifters. That plan was permitted under Article 1436e, which I think for the reasons stated above was insufficient to show state action, and was doubtless a reasonable measure in the face of serious losses from shoplifting. The police, as is their duty, responded to reports of lawbreaking. On the evidence, this is the "pre-arranged plan." There is nothing in the record to show that the police were influenced in their choice of procedures by Sandel or Nevill as implied by the trial

court's finding or that they had any control over what procedures the police followed. I do not think that the fact that the police picked up many shoplifters detained by Brookshire Brothers changes the result; there is still nothing to show that the police proceeded according to the wishes of Brookshire Brothers, or any other merchant, or that they would have acted differently in response to reports of other sorts of crimes. The vision of a citizen's hesitating to call for police assistance in fear they may, when they arrive, employ some unconstitutional procedure over which he has no control and thus render him liable in a ‡ 1983 action is not an attractive one. I would decline to give it form. A procedure unilaterally devised by the police to take shoplifters into custody if called on amounts to no more than what police do always and everywhere and does not suffice to show state action in this suit against private parties under ‡ 1983.

The record passages cited by the majority amount to no more than mild four-finger exercises by the examiner in putting words into witnesses' mouths[3] and, being the best evidence that the record offers to support the finding of a preconceived plan to deprive plaintiffs of their constitutional rights, reveal with eloquence the want of proof of such a thing. The first two establish that there was indeed a "plan." The plan was,

[3] Ironically, in one of the passages quoted the examiner is the defendants' attorney, who is trying to explain through the witness' mouth that the "preconceived plan" to which he has already admitted is nothing more than one to call the police when a shoplifter is caught.

as I have noted above, that when a merchant caught a shoplifter (or thought he had), he would call the police to come out rather than taking him down to the station himself. The third and last passage is merely Sandel's explanation of why he filed a complaint against both women rather than Ms. McClure alone. Reading them over, I am able to see the plate all right, but the ghost escapes me.[4]

I would reverse.[5]

[4] (T)he government brought and testified to its case with no more real support in the evidence for a finding of guilt that there was for the finding that a ghost had been seen in the story of a man who said, "My friend saw a ghost eating off a plate at his house last night, and if you don't believe it, here is the plate he says he saw the ghost eating from." Hutcheson, C.J., writing for the court in *Panci v. United States,* 256 F.2d 308, at 312 (5th Cir. 1958).

[5] Diversity was alleged below; however, it is clear that complete diversity was lacking. Likewise, plaintiffs failed to show a violation of ‡ 1985.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2606

VIRDIE L. SMITH, ET AL,
Plaintiffs-Appellees

v.

BROOKSHIRE BROTHERS, INC., ET AL
Defendants-Appellants

**Appeal from the United States District Court
For the Eastern District of Texas**

ON PETITION FOR REHEARING

(October 20, 1975)

Before GOLDBERG, CLARK and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Judge Gee, Circuit Judge, dissents from the denial of rehearing for the reasons stated in his dissent from the panel opinion.